

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ERNESTO M. CONTRERAS,
Petitioner,

v.

ROSEMARY NDOH, Warden,
Respondent.

Case No. 20-06206 BLF (PR)

**ORDER OF INITIAL REVIEW;
DENYING MOTION FOR STAY
WITHOUT PREJUDICE;
DIRECTING PETITIONER TO
FILE RENEWED MOTION**

Petitioner, a California inmate, filed a *pro se* petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, challenging his state conviction in Santa Clara County Superior Court.¹ Dkt. No. 1. Petitioner has paid the filing fee. Dkt. No. 6.

DISCUSSION

I. Standard of Review

This court may entertain a petition for a writ of habeas corpus “in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C.

¹¹ This matter was reassigned to this Court on October 6, 2020, after Petitioner did not file consent to magistrate judge jurisdiction in the time provided. Dkt. Nos. 3, 5.

1 § 2254(a).

2 It shall “award the writ or issue an order directing the respondent to show cause
3 why the writ should not be granted, unless it appears from the application that the applicant
4 or person detained is not entitled thereto.” *Id.* § 2243.

5 **II. Analysis**

6 Petitioner claims the following grounds for habeas relief: (1) the trial court
7 incorrectly imposed consecutive sentencing under state law; (2) the state appellate court
8 denied him due process by failing to remand the matter after the trial court incorrectly
9 imposed consecutive sentences; and (3) there was insufficient evidence to support Count 3,
10 aggravated sexual assault of a child, in violation of his right to a fair trial and due process.
11 Dkt. No. 1 at 5. Liberally construed, these claims are cognizable under § 2254 and merit
12 an answer from Respondent.

13 Petitioner contends that a polygraph that he took and passed was never argued on
14 appeal, and seeks a stay to exhaust this new claim in state court. Dkt. No. 1 at 5-6. The
15 United States Supreme Court has held that a district court may stay mixed habeas petitions
16 to allow the petitioner to exhaust in state court. *Rhines v. Weber*, 544 U.S. 269, 277-78
17 (2005). *Rhines* requires a petitioner to show (1) “good cause” for his failure to exhaust his
18 claims in state court; (2) that his unexhausted claims are not “plainly meritless”; and (3)
19 that he has not engaged in “intentionally dilatory litigation tactics.” 544 U.S. at 278.
20 Petitioner has failed to argue any and all of the factors under *Rhines* to warrant a stay.
21 Accordingly, the request is DENIED without prejudice to filing a renewed motion,
22 showing that he satisfies the *Rhines* factors. If Petitioner fails to make such a showing, the
23 matter shall proceed on the cognizable claims identified above.

24 **CONCLUSION**

25 For the foregoing reasons, Petitioner’s motion for a stay is DENIED without
26 prejudice to filing a renewed motion that satisfies *Rhines v. Weber*, 544 U.S. 269 (2005).
27 Petitioner shall file the renewed motion **no later than twenty-eight (28) days** from the
28

1 date this order is filed. If Petitioner fails to file the motion in the time provided, the Court
2 shall order the matter served on Respondent to proceed on the cognizable claims identified
3 herein.

4 **IT IS SO ORDERED.**

5 **Dated: _January 4, 2021_**



BETH LABSON FREEMAN
United States District Judge

United States District Court
Northern District of California

25 Order of Initial Review; Denying Mot.; Directing P. to File Renewed Motion
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